DISSENTING VIEWS

We oppose H.R. 420 because it will not reduce frivolous lawsuits but will increase the costs of litigation at the state and Federal level, significantly increase the complexity of all cases, set back the cause of civil rights, and confuse entirely Federal and state law concerning personal jurisdiction and venue. This sweeping overhaul of our civil justice system predicated on the thinnest conceivable record, with no hearing and on the basis of a few anecdotes and hypothetical concerns.

The legislation is opposed by numerous civil rights, consumer and judicial groups, including the United States Judicial Conference, the NAACP, Public Citizen, the Alliance for Justice, People for the American Way, the American Association of People with Disabilities, the Lawyers' Committee for Civil Rights Under Law, the Conference of Chief Justices, the American Bar Association, the National Conference on State Legislatures, National Partnership for Women, National Women's Law Center, the Center for Justice & Democracy, Consumers Union, National Association of Consumer Advocates, USAction, U.S. PIRG, and the Legal Defense Fund. The legislation is also opposed by several law professors who specialize in civil procedure, including Thomas Rowe of Duke Law School, Christopher Fairman at Ohio State University, Moritz College of Law, and Jonathan Siegel at George Washington University Law School.

For the reasons set forth herein, we respectfully dissent.

DESCRIPTION OF LEGISLATION

Section 2 of the bill makes a number of changes to Rule 11 of the Federal Rules of Civil Procedure concerning attorney sanctions for improper pleadings and motions.[1] First, it would revert to the pre-1993 rules by removing a court's discretion to impose sanctions on improper and frivolous pleadings (*e.g.*, it makes the sanctions mandatory, rather than discretionary). Second, it would eliminate the current "safe harbor" provision permitting attorneys to withdraw improper or frivolous motions 21 days after they are challenged by opposing counsel.[2] Third, it would eliminate the provision providing that the sanction rules do not apply to discovery violations.[3]

Section 3 of the bill applies this new Federal Rule 11 to state cases that affect interstate commerce and requires the judges to

[1] Since these changes amend the Federal Rules of Civil Procedure, they are all subject to modification or revision by the Federal judiciary pursuant to the Rules Enabling Act. *See* 28 U.S.C. §§ 2071–2077 (2004).

[2] Currently, no withdrawal right exists for court-initiated sanctions.

[3] Such violations are already subject to mandatory sanctions under Rule 26 (g) of the Federal Rules.

make this determination within 30 days after the filing of the motion for sanctions.

Section 4 of the bill alters both Federal and state jurisdiction and venue rules. It provides that suits may "only" be filed in the state and county (or Federal district) where the plaintiff resides, where the injury took place, or where the defendant's principal place of business is located. As such, it eliminates the possibility of a harmed victim pursing a corporate defendant where it is incorporated and in many states where it is found to be doing business. It also contains a "most appropriate forum" provision, which mandates dismissal of the lawsuit (rather than transfer) if the court determines another forum "would be the most appropriate forum."

Section 5 of the bill is a rule of construction, stating that the proposed Rule 11 modifications are not to be construed to bar or impede the assertion or development of "new claims or remedies under the civil rights laws."

I. MANDATORY SANCTIONS WILL HARM CIVIL RIGHTS ACTIONS:

By requiring a mandatory sanctions regime that would apply to civil rights cases, H.R. 420 will chill many legitimate and important civil rights actions. This is due to the fact that much, if not most, of the impetus for the 1993 changes stemmed from abuses by defendants in civil rights cases—namely that civil rights defendants were choosing to harass civil rights plaintiffs by filing a series of rule 11 motions intended to slow down and impede meritorious cases.

For example, a 1991 Federal Judicial Study: *The Federal Judicial Center's Study of Rule 11* found that "The incidence of Rule 11 motions or *sua sponte* orders is higher in civil rights cases than in some other types of cases."[4] Another study showed that "civil rights case made up 11.4% of Federal cases filed, [and] that 22.7% of the cases in which sanctions had been imposed were civil rights cases."[5]

Another recent study found that "revisions to Rule 11 (the 1993 amendments) alleviate what was perceived as the rule's disproportionate impact on civil rights plaintiffs. Under the 1983 version, both the fact that sanctions were mandatory and that there was a significant risk that a large attorney fee award would be the sanction of choice were believed to have had a stifling effect on the filing of legitimate civil rights claims. . . . Furthermore, there is ample evidence to suggest that plaintiffs and civil rights plaintiffs in particular, were far more likely than defendants to be the targets of Rule 11 motions and the recipients of sanctions."[6]

As Professor Theodore Eisenberg, Professor Law, Cornell University testified before the House Judiciary Committee during the hearing on H.R. 4571 in the 108th Congress, "A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be dis-

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[4] John Shepard et al., Fed. Jud. Ctr., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 11 (1995). The Federal Judicial Center is the educational and research arm of the Federal judiciary. *See* 28. U.S.C. § 620 (2004).

[5] Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943 (1992).

[6] *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHSLJ 1555, 1568 (2001).

couraging the civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported abuse in an area of law, personal injury tort, found to have less abuse than other areas."[7]

A good example of the effect of this rule on civil rights cases was cited by the Honorable Robert L. Carter, United States District Court Judge for the Southern District of New York, when he stated: "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start."[8]

The language in the bill that purports to mitigate the damage to civil rights cases is not sufficient to alleviate our concerns. Section 5 of the bill states that the proposed Rule 11 changes shall not be construed to "bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The problem is the language does not clearly and simply exempt civil rights and discrimination cases, as should be the case. Determining what a "new claim or remedy" is will be a daunting and complex issue for most courts and clearly does not cover all civil rights cases in any event.

Finally, H.R. 420 does not provide an attorney with the ability to appeal a Rule 11 sanction. History has demonstrated that civil rights lawsuits are extremely unpopular, particularly in certain parts of the country where some judges almost automatically consider civil rights cases frivolous. In such courts, plaintiffs' attorneys would unreasonably be subject to sanctions, and even suspension, without appeal contrary to the purpose of Rule 11.

II. FEDERAL JUDGES OPPOSE THESE CHANGES TO RULE 11:

The Federal judiciary—the individuals most affected by these changes to Rule 11—oppose changes to Rule 11 that would make sanctions mandatory rather than discretionary. On May 17, 2005, the Judicial Conference of the United States wrote a letter to Chairman Sensenbrenner stating, in no uncertain terms, that "the proposed changes to Rule 11 will not help deter litigation abuses, but will increase satellite litigation, costs, and delays."[9] The letter includes a report by the Federal Judicial Center: "Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure." The report, prepared at the request of the Judicial Conference's Advisory Committee on Civil Rules, surveyed trial judges who apply the rules. The survey included judges who have had experience under both the 1983 version and the 1993 version, as well as judges with experience under the 1993 version only.[10] As the letter states, the re-

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[7] *Uncertain and Certain Litigation Abuses, 2004: Hearings on Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse, Before the House Comm. on the Judiciary,* 108th Cong. (2004) (statement of Theodore Eisenberg, Professor, Cornell University).

[8] Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. Pa. L. Rev. 2179, 2193 (June 1989).

[9] Letter from Leonidas Ralph Mecham, Secretary, U.S. Judicial Conference, to Honorable F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, May 17, 2005.

[10] *Id.* at 2.

port "shows a *remarkable consensus* among Federal district judges supporting existing Rule 11 and opposing its amendment."[11]

Specifically, "the survey's findings include the following highlights:

- More than 80 percent of the 278 district judges surveyed indicate that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 or H.R. 420);
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;
- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the Federal bench, and 54 percent noting that such litigation has remained relatively constant; and
- 72 percent believe that addressing sanctions for discovery abuse in rule 26(g) and 37 is better than in Rule 11."[12]

As the Federal Judicial Center's study shows, "federal district judges [are] united [in] opposition to amending Rule 11."[13]

III. THE FORUM SHOPPING PROVISION WILL UNFAIRLY BENEFIT FOREIGN CORPORATIONS TO THE DISADVANTAGE OF THEIR U.S. COMPETITORS:

Section 4 of the bill would recast state and Federal court jurisdiction and venue in personal injury cases. The provision would operate to provide a litigation and financial windfall to foreign corporations at the expense of their domestic competitors. This is because, instead of permitting claims to be filed wherever a corporation does business or has minimum contacts, as most state long-arm statutes provide, Section 4 only permits the suit to be brought where the defendant's principal place of business is located.[14] This means

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[11] *Id.* (emphasis added).

[12] *Id.* at 3.

[13] *Id.*

[14] As a threshold, it is quite problematic even determining how the forum shopping provision would apply. Depending upon the meaning of the term "only" in the phrase "may be filed only in the state . . . ," the provision could be read as (1) creating a new grant of jurisdiction and venue, or (2) merely limiting the current rules to the specified new rules. If it is a new grant of jurisdiction and venue, the section would serve to authorize suits wherever plaintiffs reside or were injured, even if there are no minimum contacts with the defendant. This would lead to an explosion in cases, and would decimate years of Supreme Court decisions holding that defendants may only be sued where jurisdiction lies (*Pennoyer v. Neff*, 20 A.L.R. 3d (1201)) or where the defendant has minimum contacts (*International Shoe Co. v Washington*, 326 U.S. 310 (1945)). If the provision operates as a limit on the current rules, it would represent a significant Federal usurpation of state court rules, possibly in violation of the Commerce Clause and the Tenth Amendment. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), striking down the Violence Against Women Act and the Gun Free School Zone Act as unconstitutional, holding that Congress lacked the authority to pass laws

that it will be far more difficult to pursue a personal injury or product liability action against a foreign corporation in the United States.

Consider the case of a U.S. citizen that is harmed by a product produced or manufactured by a foreign competitor. If that foreign company transacts business or has minimum contacts in a state other than the state of the plaintiff's residence or where the injury occurred, as is often the case, any suit against the foreign company would be banned by H.R. 420. In other words, the harmed U.S. citizen would have no recourse against a foreign corporation, whereas he or she would have recourse against a comparable U.S. corporation. This is unfair to both the U.S. citizen and all U.S. companies that compete against the foreign firm. It is hard for us to understand why the Congress would want to pass a law that grants foreign companies such a financial windfall at the expense of U.S. firms.

IV. SECTION 4 WILL PLACE VICTIMS AT A SIGNIFICANT LITIGATION DISADVANTAGE COMPARED WITH CORPORATE DEFENDANTS:

It is difficult to consider H.R. 420 as even-handed litigation reform, when it is drafted to so obviously benefit corporate defendants. Consider the operation of subsection (b), requiring a court to dismiss properly filed legal claims if it determines another forum would be "the most appropriate." There is no legal precedent for a court having such open-ended authority to dismiss lawful actions. The problems and unfairness with this provision are many. First, of course, is the ambiguous, open-ended wording. The legislation gives absolutely no guidance as to what a court is to take into account in determining which court is "most appropriate." Is it nexus to the injury, the plaintiff, the defendant or the bulk of other claims? Until this issue is worked out, significant hardships will no doubt result. While defendants do not mind waiting, the confusion would work a significant disadvantage to harmed victims in immediate need of compensation. Moreover, beyond this ambiguity, mandating dismissal would seem to be an extreme and costly remedy as compared to simply transferring the case to another court.

Section 4 suffers from an overall ambiguity in drafting. First, it is unclear whether the finding of the first court that a second court is most appropriate binds the second court under general rules of preclusion. If it is binding, the first court might make an egregious error that would inappropriately transfer a case to a second court a case, leaving that the parties no recourse. However, if the decision is not binding, then plaintiffs' lawsuits could get bounced around by a string of courts, all asserting that another court is most appropriate. Further adding to confusion, it is also unclear whether a dismissal is appealable, which could cause huge delays. Even more problematic, the provision is unclear as to whether the statute of limitations would be tolled during such appeal (the stat-

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that have only an attenuated affect on interstate commerce. This point is highlighted in a letter analyzing the bill from Professor Christopher Fairman of the Ohio State University, Moritz College of Law. In his letter, Professor Fairman states that "the venue provision of section 4 has absolutely no constitutional anchor. Quite simply, Congress does not have the authority under the Constitution to impose a venue statute on personal injury litigants who file their claims in state court."

ute is tolled until the claim is dismissed under the bill, but what about afterwards until a new claim is filed?). The provision will also cause delay because it requires the state court to make another time consuming and costly determination before accepting or dismissing the case. Again, while these delays may not burden a defendant, plaintiffs, who may be in drastic need of medical attention and expenses, are deprived of timely adjudication of their claims.

Moreover, it seems fundamentally unfair for Section 4 to apply only to personal injury lawsuits when studies show that business lawsuits are far more prevalent and costly. In fact, a study by Public Citizen shows that businesses file four times as many lawsuits as do individuals represented by trial lawyers.[15] Another paper, reported by the National Law Journal in November 2003, showed that of the top ten jury verdicts rendered thus far that year, 8 of the 10 involved businesses suing other businesses—accounting for $3.12 billion of the total $3.54 billion awarded by the ten juries. Only two of the ten cases were brought by individuals for personal injuries.[16] If the Majority believes so strongly in the efficacy of this forum shopping provision, they should be willing to apply it across the board.

CONCLUSION

Says one briefing book for House Republicans: "attacking trial lawyers is admittedly a cheap applause line, but it works. It's almost impossible to go too far when it comes to demonizing lawyers."[17] H.R. 420, The "Lawsuit Abuse Reduction Act of 2005," is single-mindedly obsessed with a litigation crisis that simply does not exist. All empirical evidence suggests that the number of lawsuits are declining, that jury awards are shrinking, and that the costs of litigation to small businesses and to the overall American economy are slight if at all significant. H.R. 420 would confuse Federal jurisdiction jurisprudence, have a chilling effect on civil rights litigation, and enact sweeping changes to the Federal judiciary with little discussion or deliberation. For these reasons, we respectfully dissent.

DESCRIPTION OF AMENDMENTS OFFERED AT MARKUP

During the markup four amendments were offered by Democratic Members:

1. Nadler Amendment

Description of Amendment: The amendment would prohibit a court from ordering a court record sealed or subjected to a protective order, or otherwise to restrict access to taht record, unless the court makes a finding of fact that identifies the interest that justifies the order and determines that the interest outweighs any interest in the public health and safety that the court determines would be served by not sealing or restricting the court record.

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[15] America's Litigious Businesses, September 2004, study on file with Judiciary Committee.

[16] It is worth noting that Public Citizen's survey of the 100 most recent decisions by Federal judges finding Rule 11 violations found that businesses were almost twice as likely as personal injury plaintiffs to be sanctioned for engaging in frivolous litigation.

[17] Frank Lutz, *Language of the Twenty-First Century* (1997)

Vote on Amendment: The amendment was withdrawn after Representative Nadler and Representative Smith agreed to work on the language before the bill comes up before the full House.

2. Scott Amendment

Description of Amendment: The amendment would rein in frivolous lawsuits without harming the ability of legitimate cases to be brought. The amendment proposed that after three consecutive adverse decisions on the merits, a person attempting to file yet another claim on the same issue be saddled with a rebuttable presumption of a Rule 11 violation. The amendment would have applied to the Terri Schiavo case, in which multiple courts ruled against the plaintiffs.

Vote on Amendment: The amendment was agreed to by voice vote.

3. Nadler Amendment

Description of Amendment: The amendment provides that whoever influences, obstructs or impedes, or endeavors to influence, obstruct or impede, a pending court proceeding through the intentional destruction of documents sought in and highly relevant to that proceeding shall (1) be punished with mandatory civil sanctions and (2) be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings. The amendment applies to any court proceeding in Federal or State court.

Vote on Amendment: The amendment was agreed to by voice vote.

4. Conyers Amendment

Description of Amendment: The amendment would exempt from the provisions of the Act actions against a manufacturer, seller, or trade association that, on or after the date of enactment, shifts or transfers employment positions of facilities to a location outside the United States. The amendment was designed to ensure that companies that relocate offshore do not receive the benefit of the liability limitations in the Act.

Vote on Amendment: The amendment was defeated by a party-line vote of 17–11. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Waters, Meehan, Weiner, Schiff, Sánchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Lungren, Jenkins, Cannon, Inglis, Hostettler, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
ROBERT WEXLER.
ANTHONY D. WEINER.

LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.

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